Nos. 92-484 and 92-507

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES NATIONAL BANK OF OREGON,
Petitioner

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*

STEPHEN L. STEINBRINK, ACTING COMPTROLLER OF THE CURRENCY, *et al.*,
Petitioners

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER UNITED STATES NATIONAL BANK OF OREGON

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QUESTIONS PRESENTED

1. Whether 12 U.S.C. § 92, which authorizes national banks in certain circumstances to solicit and sell insurance, remains in force.

2. Should the court of appeals have determined whether 12 U.S.C. § 92 remains in force, where the parties neither presented nor took adverse positions on that issue.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Independent Insurance Agents of Oregon, the National Association of Casualty & Surety Agents, the National Association of Surety and Bond Producers, the National Association of Life Underwriters, the National Association of Professional Insurance Agents, the Oregon Association of Life Underwriters, and the Oregon Professional Insurance Agents, Inc. were plaintiffs in the district court and appellants in the court of appeals. Robert L. Clarke, Comptroller of the Currency, and the Office of the Comptroller of the Currency were defendants in the district court and appellees in the court of appeals. The United States was a defendant in the district court.

The following information is provided under Rule 29.1 of the Rules of this Court: The parent company of petitioner United States National Bank of Oregon is U.S. Bancorp, whose shares are publicly held.

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BRIEF FOR PETITIONER UNITED STATES NATIONAL BANK OF OREGON

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a), is reported at 955 F.2d 731.[1] The opinion of the district court (Pet. App. 40a-66a) is reported at 736 F. Supp. 1162.

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[1] "Pet. App." refers to the appendix to the petition filed in No. 92-484.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1992. Petitions for rehearing were denied on May 22, 1992. Pet. App. 30a. On August 7, 1992, the Chief Justice extended the time within which to file petitions for a writ of certiorari to and including September 21 in No. 92-484, and September 19 in No. 92-507. The petitions were filed on September 18, 1992, and were granted on December 14, 1992. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 752 (a portion of which was codified at 12 U.S.C. § 92), is reprinted at Pet. App. 67a-76a. Section 5202 of the Revised Statutes is reprinted at Pet. App. 77a. Section 13 of the Federal Reserve Act, ch. 6, Pub. L. No. 63-43, 38 Stat. 251, 263-64 (1913), is reprinted at Pet. App. 77a-80a. Section 20 of the War Finance Corporation Act of 1918, ch. 45, Pub. L. No. 65-121, 40 Stat. 506, 512, is reprinted at Pet. App. 80a-81a.

STATEMENT

A. The Statutory and Regulatory Scheme

1. Congress has vested the Comptroller of the Currency with substantial supervisory authority over the formation, supervision, and operation of national banks. The Comptroller exercises such authority principally under the National Bank Act (NBA), 12 U.S.C. §§ 21 *et seq.* *See, e.g., Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403-04 (1987); *Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1168 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980).[2]

[2] Congress has delegated to the Comptroller the authority for promulgating rules and regulations under the NBA. *See* 12 U.S.C. § 93a.

2. Under 12 U.S.C. § 92, which Congress enacted in 1916, a national bank

> located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State.

Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 753.[3]

Under a longstanding regulation, the Comptroller has applied the authority set forth in Section 92 to any national bank branch office "located in a community . . . of less than 5,000," regardless of whether the bank's principal office is located in a larger community. 12 C.F.R. § 7.7100.[4] Under other regulations, the Comptroller has required any national bank wishing to perform such "new activities" through a subsidiary to submit a written proposal to the Deputy Comptroller for the

[3] As this Court has pointed out, "[w]hen the statutes were revised in 1918 and re-enacted, § 92 was omitted. The revisers of the United States Code have omitted it from recent editions of the Code." *Commissioner v. First Sec. Bank of Utah, N.A.*, 405 U.S. 394, 401 n.12 (1972).

Section 92 appeared in each edition of the United States Code until the 1952 edition. *See* 12 U.S.C. § 92 (1926); 12 U.S.C. § 92 (1928); 12 U.S.C. § 92 (1934); 12 U.S.C. § 92 (1940); 12 U.S.C. § 92 (1946). Section 92 no longer appears in the United States Code Annotated, *see* 12 U.S.C.A. § 92 (West 1989 & Supp. 1992), but it remains in the United States Code Service, *see* 12 U.S.C.S. § 92 (Law. Co-op. 1978 & Supp. 1992). For clarity, we cite to the statute as it appeared in the United States Code.

[4] The Comptroller first codified the regulation in 1971. *See* 36 Fed. Reg. 17,000, 17,015 (1971). The regulation stemmed from an interpretive ruling issued in 1963. *See* C.A. App. 99-100 ("C.A. App." refers to the joint appendix filed in the court of appeals).

district in which the bank's principal office is located. 12 C.F.R. § 5.34(d)(1)(i). After receiving the proposal, the Comptroller determines whether the activities would "exceed those legally permissible for a national bank's operating subsidiary." 12 C.F.R. § 5.34(d)(1)(iii); *see* Pet. App. 43a.

B. The Proceedings in This Case

1. Petitioner United States National Bank of Oregon is a national bank chartered under the NBA, with its principal office in Portland, Oregon. In October 1984, petitioner submitted a "new activities" proposal to the Comptroller's Western District. Invoking the authority set forth in Section 92, petitioner sought to offer, through a subsidiary, "a full range of insurance products" from one of petitioner's branch offices located in the small town of Banks, Oregon. Pet. App. 44a (internal quotation marks and citation omitted).

In August 1986, the Comptroller approved petitioner's proposal and thus authorized petitioner's subsidiary "to sell insurance to customers residing outside [Banks, Oregon]." Pet. App. 47a (internal quotation marks and citation omitted). After reviewing the text, legislative record, and purposes of Section 92, the Comptroller concluded that the statute permits petitioner

> at its operating subsidiary in Banks, Oregon, to sell insurance as agent to existing and potential customers regardless of where the insurance customers are located.

C.A. App. 69; *see* Pet. App. 47a-49a.[5]

2. In November 1986, respondents, various trade associations representing insurance agents and underwriters,

[5] The Comptroller, however, made clear that petitioner "could not sell insurance for a company to customers located in a state where the insurance company is not authorized to do business." C.A. App. 69; *see* Pet. App. 49a.

filed actions against the Comptroller in the United States District Court for the District of Columbia.[6] Respondents challenged the Comptroller's approval of petitioner's proposal arguing, among other things, that Section 92 must be construed as placing a geographical limit on the location of such insurance customers.[7] Respondents therefore contended that the Comptroller's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see* Pet. App. 3a.

On cross-motions for summary judgment, the district court in May 1990 upheld the Comptroller's approval of petitioner's proposal. Pet. App. 40a-66a. Although respondents raised no claim that Section 92 was not in force, the district court pointed out that Section 92 "no longer appears in the United States Code." Pet. App. 41a n.2. The court concluded, however, that that fact was immaterial "since Congress, other courts, and the Comptroller have presumed [the statute's] continuing validity." Pet. App. 41a n.2 (citations omitted).

Turning to the substantive issue, the court applied the framework set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984),

[6] Petitioner intervened as an additional defendant after respondents had filed their complaints. *See* Pet. App. 41a. The district court later consolidated the substantially similar actions. Respondents also named the United States as a defendant. The district court later granted the Comptroller's unopposed motion to dismiss summarily the complaints against the United States. *See* Pet. App. 41a & n.1.

[7] Respondents raised, but later withdrew, a claim based on the restrictions on "branch banking" set forth in 12 U.S.C. §§ 36, 81. Pet. App. 49a n.16.

Respondents also raised claims under the Bank Holding Company Act of 1956 (BHCA), 12 U.S.C. §§ 1841 *et seq.* The district court denied those claims, *see* Pet. App. 63a-65a, and the court of appeals had no occasion to review them. Accordingly, those claims are not at issue before this Court.

and concluded that Section 92 "is silent with respect to geographic limitations on sale and solicitation." Pet. App. 56a. Proceeding therefore to the second inquiry under *Chevron*, the court reviewed the Comptroller's construction of and decisions under Section 92 and held that "the Comptroller's interpretation, being rational and consistent with the statute, must be upheld." Pet. App. 63a (internal quotation marks and citations omitted). Accordingly, the court rejected respondents' challenge to the Comptroller's approval of petitioner's proposal. Pet. App. 65a-66a.

C. The Court of Appeals Decision

In February 1992, a divided panel of the court of appeals reversed. Pet. App. 1a-29a. Despite the fact that none of the parties had raised such a challenge, the court decided to address the question whether Section 92 remained in force.[8] The court determined that because placement of quotation marks shows that Congress originally enacted Section 92 as part of Section 5202 of the Revised Statutes, and then omitted the language of Section 92 from Section 5202 when the latter provision was amended in 1918,[9] Section 92 "has ceased to exist." Pet. App. 17a. The court thus held that the Comptroller's "ruling [was] not in accordance with law," without reaching the substantive issue resolved below. Pet. App. 18a.

Judge Silberman dissented. Pet. App. 23a-29a. In his view, "the majority is quite wrong in its perception of our judicial obligation." Pet. App. 25a. As Judge Silberman explained:

> We owe no abstract duty to Congress (or the President) to enforce or not to enforce laws; all of our power derives from our constitutional duty to decide cases and controversies. The issue of section 92's validity was decidedly not part of the "case or controversy" as it was brought to the district court or on appeal to us.

Pet. App. 25a. He therefore concluded that the court had improperly "created a controversy that did not exist." Pet. App. 25a. Accordingly, Judge Silberman would

> affirm the district court on the ground that the Comptroller's ruling is a reasonable interpretation of section 92, and note that we do not decide the significance of Congress' actions in 1918.

Pet. App. 29a.

The court of appeals later denied petitions for rehearing, together with suggestions for rehearing en banc. Pet. App. 30a-39a.[10]

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[8] In the court of appeals, no party (including respondents) or amicus curiae challenged the validity of Section 92. In their opening brief, respondents pointed out that although Section 92 "appears to have been repealed inadvertently in 1918[,] . . . Congress, the Comptroller, and the federal courts have, however, presumed that the statute remains in effect." Resp. C.A. Br. 5 n.3. In response to the court's *sua sponte* order requesting the parties to address that issue at oral argument on March 1, 1991, respondents' counsel candidly stated at that time that although

> [i]t would quite obviously be to [respondents'] advantage if section 92 were no longer in existence, . . . we have concluded that we cannot advance a substantial argument that section 92 no longer exists.

Pet. App. 24a. Indeed, in response to the court's second *sua sponte* order issued after oral argument that requested supplemental briefing, respondents expressly adhered to their position of accepting the validity of Section 92. *See* Resp. Supp. C.A. Br. 1-2; *see also* note 10, *infra*.

[9] *See* War Finance Corporation Act of 1918, ch. 45, Pub. L. No. 65-121, § 20, 40 Stat. 512.

[10] In submitting its court-ordered response to the petition for rehearing filed by the Comptroller and petitioner, respondents did an about-face and agreed with the court of appeals that Section 92 no longer remained in force. *See* Resp. C.A. Opp. to Pet. for Rehearing 2, 8-24; *see also* note 8, *supra*.

Judge Silberman dissented from the denial of rehearing. Pet. App. 30a. Judges Silberman, Williams, and D.H. Ginsburg dissented

[Continued]

SUMMARY OF ARGUMENT

I. The court of appeals invalidated Section 92 based on the placement of quotation marks in the original provision, the Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 753. In the court's view, this punctuation reflected Congress's intention to make that provision part of Section 5202 of the Revised Statutes, which Congress amended in 1918 without including the language of Section 92 enacted in 1916. The court's analysis of the quotation marks in isolation is mistaken. All the available evidence—the language, structure, and subject matter of the statute—shows that Congress enacted Section 92 as an amendment to the Federal Reserve Act and did not repeal Section 92 in 1918 when it amended Section 5202 by the War Finance Corporation Act.

A. A close look at the 1916 enactment confirms that Congress intended to add what became Section 92 to Section 13 of the Federal Reserve Act of 1913, not to Section 5202 of the Revised Statutes. (For clarity, "Section 92" refers to the statutory text enacted in 1916.) The paragraph of the 1916 enactment immediately preceding the reference to Section 5202, and the paragraph of the 1916 enactment immediately preceding the reference to the Section 92 provision, each expressly refers to "this Act," *i.e.*, the Federal Reserve Act. By contrast, the Section 5202 reference in the 1916 enactment—which appears before the paragraph containing what became Section 92—concludes with a cross-reference to "the Federal reserve Act." This specific reference thereby demonstrates that the paragraph identified as "Fifth" marks the end of the Section 5202 reference. In other words, the language of the 1916

[10] [Continued]
from the denial of rehearing en banc, and would have limited rehearing to the issue of the court's authority to reach the question whether Section 92 remained in force. Pet. App. 35a-37a. Judge Sentelle, joined by Judges Buckley and Henderson, filed a separate opinion concurring in the denial of rehearing en banc that took issue with Judge Silberman's dissent. Pet. App. 33a-34a. Judge Randolph filed a separate statement. Pet. App. 38a-39a.

enactment shows that Congress intended that each of the paragraphs following the Section 5202 reference—including Section 92—would become part of the Federal Reserve Act.

This straightforward construction of the statute reveals the court of appeals' error in placing undue weight on the placement of punctuation. The placement of the punctuation in the final printed version of the 1916 enactment—setting off each paragraph after the sixth paragraph as part of Section 5202—should not control over the evidence in the text of the 1916 Act that Congress placed Section 92 in the Federal Reserve Act, not Section 5202 of the Revised Statutes.

The available legislative record confirms that Congress placed Section 92 in Section 13 of the Federal Reserve Act, not in Section 5202 of the Revised Statutes. That record also makes clear that Congress did not intend for the quotation marks to have any significance in interpreting the statute. Indeed, the contemporaneous legislative materials show that it was only in the versions reprinted in the House and Senate records—after the Conference Committee's final marked-up version showing Section 92 to be part of the Federal Reserve Act had been approved—that the inadvertent quotation marks appeared. This clerical insertion, or error, may not change the substance of Congress's intended enactment.

The subject matter of the banking statutes at issue—Section 5202 of the Revised Statutes, Section 13 of the Federal Reserve Act of 1913, and the 1916 amendments to the Federal Reserve Act—further demonstrates that Section 92 initially belonged in the Federal Reserve Act.

B. Congress did not repeal Section 92 by the 1918 War Finance Corporation Act. By its terms, the 1918 Act did not affect the status of the Federal Reserve Act, which contained Section 92. Instead, the 1918 Act

amended only one aspect of the national bank authority contained in Section 5202 of the Revised Statutes.

The legislative record surrounding the 1918 Act confirms what is apparent from the statutory text, namely, that Congress had no intention of repealing the national bank insurance authority recently enacted by Section 92. That record shows that there is no plausible basis for assuming that Congress, by enacting the 1918 Act in order to assist in financing the war effort, had any intention of repealing the unrelated bank authority set forth in Section 92. In these circumstances, the established rule against implied repeals should be followed.

C. The Comptroller, the Federal Reserve Board, the Congress, and the federal courts, including this Court, have uniformly considered Section 92 to be in effect since its inception. The texts and legislative record of the relevant statutes in this case do not support the conclusion that Section 92 was repealed. At the least, there is ambiguity. In such circumstances, that contemporaneous, longstanding, and uniform administrative, congressional, and judicial position regarding the validity of Section 92 is entitled to considerable weight.

II. The court of appeals should not have even had the opportunity to construe Section 92 erroneously out of existence. Despite the court's repeated invitation, no party raised the issue and no party contended that Congress had repealed Section 92 in 1918. That unasserted claim, by its terms, does not involve the jurisdiction of either the district court or the court of appeals. As such, the issue was not properly before the court. Similarly, the Section 92 issue does not involve the sort of "plain error" warranting departure from the general prohibition against addressing unasserted claims. Proper resolution of that issue is not beyond any doubt; nor is this a case where "injustice might otherwise result" if that issue had not been determined. *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

The court of appeals also erred by reaching out to nullify Section 92 by creating a controversy of its own making. That issue should not have been resolved where, as here, the parties neither presented nor took adverse positions on whether Section 92 remains in force.

ARGUMENT

I. SECTION 92 REMAINS IN FORCE

A. Congress Enacted Section 92 As Part Of The Federal Reserve Act Of 1913

The court of appeals declared that Section 92 no longer exists by focusing on punctuation contained in the original enrolled bill. More specifically, the court of appeals invalidated Section 92 based on the placement of quotation marks in the original provision, the Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 753. *See* Pet. App. 7a-8a, 67a-72a. In the court's view, this punctuation reflected Congress's intention to make that provision part of Section 5202 of the Revised Statutes, which Congress amended in 1918 without including the language of Section 92 enacted in 1916. In concluding that Congress repealed Section 92 in 1918, the court of appeals ignored statutory language and overlooked pertinent aspects of the legislative record. All the available evidence—the language, structure, and subject matter of the statute—shows that Congress enacted Section 92 as part of the Federal Reserve Act of 1913 and did not repeal Section 92 in 1918 when it amended Section 5202 by the War Finance Corporation Act.

1. *The text of the 1916 Act shows that Congress enacted Section 92 as part of the Federal Reserve Act*

This Court has recently reiterated the "cardinal rule that a statute is to be read as a whole, . . . since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 112 S. Ct. 570, 574 (1991) (citation omitted); *see, e.g., Shell Oil Co. v.*

Iowa Dep't of Revenue, 488 U.S. 19, 26 (1988). In other words, "'[i]n ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.'" *McCarthy v. Bronson*, 111 S. Ct. 1737, 1740 (1991) (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)); *see United States v. Monia*, 317 U.S. 424, 432 (1943) (Frankfurter, J., dissenting).

A close look at the 1916 enactment confirms that Congress intended to add what became Section 92 to Section 13 of the Federal Reserve Act of 1913,[11] not to Section 5202 of the Revised Statutes.[12] The paragraph of the 1916 enactment immediately preceding the reference to Section 5202 (that concerning Federal Reserve bank advances to member banks (paragraph 6)), and the paragraph of the 1916 enactment immediately preceding the reference to the Section 92 provision (that concerning Federal Reserve bank rediscounts of bills and acceptances (paragraph 8)), each expressly refers to "this Act," *i.e.*, the Federal Reserve Act. *See* Pet. App. 69a-70a. The fact that the second and third paragraphs of Section 13 of the Federal Reserve Act initially granted the banks such discount and rediscount authority further confirms that "this Act" refers to the Federal Reserve Act. *See* Federal Reserve Act of 1913, ch. 6, Pub. L. No. 63-43, § 13, 38 Stat. 263-64; Pet. App. 78a-79a; Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 752; Pet. App. 68a-69a (reenacting that discount and rediscount authority).

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[11] *See* Pub. L. No. 63-43, § 13, 38 Stat. 263-64 (1913); Pet. App. 77a-80a.

[12] Section 5202 of the Revised Statutes, originally enacted as part of the National Currency Act, *see* Act of Feb. 25, 1863, ch. 58, § 42, 12 Stat. 677; Act of June 3, 1864, ch. 106, § 36, 13 Stat. 110, dealt exclusively with limits on the indebtedness of national banks. *See* Pet. App. 77a; pp. 19-20, *infra*.

By contrast, the Section 5202 reference in the 1916 enactment (paragraph 7)—which appears before the paragraph containing what became Section 92 (paragraph 9)—concludes with a cross-reference to "the Federal reserve Act." This specific reference thereby demonstrates that the paragraph identified as "Fifth" marks the end of the Section 5202 reference. See Pet. App. 70a. In other words, the "language of the statute itself" [13] shows that Congress intended that each of the paragraphs following the Section 5202 reference—including Section 92—would become part of the Federal Reserve Act.[14]

Respondents argue, however, that the reference to "this Act" in the paragraphs preceding the references to Section 5202 and Section 92 in the 1916 enactment "could serve simply as an antecedent reference" to the Federal Reserve Act. Br. in Opp. 14. That argument ignores the components of the 1916 enactment, namely, the precise language of the 1913 Act which had amended Section 5202 by adding a fifth provision. *See* Federal Reserve Act of 1913, ch. 6, Pub. L. No. 63-43, § 13, 38 Stat. 264; Pet. App. 79a-80a. That amendment to Section 5202 of the Revised Statutes, by necessity, referred to the "Federal Reserve Act." Pet. App. 80a. By contrast, the concluding paragraph of the 1913 Act, which concerned Federal Reserve bank rediscounts of bills and acceptances, referred expressly to "this Act," namely, the Federal Reserve Act. *See* Pet. App. 80a. That concluding paragraph, which was obviously part of the Federal Reserve Act, appears in the 1916 enactment immediately preceding the reference to Section 92. *See* Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 753; Pet. App. 70a (paragraph 8). Respondents' "antecedent reference"

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[13] *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979).

[14] If, however, Congress had sought to incorporate Section 5202 into the Federal Reserve Act, it presumably would have referred to "this Act" as opposed to referring explicitly to "the Federal reserve Act."

theory therefore breaks down. The reference to "this Act" in the rediscount provision (paragraph 8)—a part of the Federal Reserve Act—confirms that the Section 5202 reference had ended.

Respondents also assert that "the phrase 'this Act' in the paragraph preceding Section 92 may refer to nothing other than the 1916 Act itself." Br. in Opp. 14. That argument fails because the reference to "this Act" in the 1916 enactment appears verbatim in Section 13 of the Federal Reserve Act of 1913. *See* Federal Reserve Act of 1913, ch. 6, Pub. L. No. 63-43, § 13, 38 Stat. 264; Pet. App. 80a. In other words, Congress was referring to the original Federal Reserve Act—not the 1916 enactment itself.[15]

Undaunted, respondents contend that the construction outlined above—although anchored to the statutory text—"does violence to express statutory language" because it requires the Court to ignore the prefatory language that Section 5202 " 'is hereby amended [so] to read as follows.' " Br. in Opp. 15; *see* Pet. App. 70a. That prefatory language appears in Section 13 of the 1913 Act, where Congress had amended Section 5202 by adding a fifth provision. *See* Federal Reserve Act of 1913, ch. 6, Pub. L. No. 63-43, § 13, 38 Stat. 264; Pet. App. 79a-80a. In order to amend Section 13 in 1916, Congress restated that provision of the Federal Reserve Act in its entirety. In so doing, the 1916 Act restated verbatim a portion of the 1913 Act that referred to amending Section 5202,

[15] Moreover, at various places in the 1916 Act, Congress referred to the following provisions: "section nineteen of this Act," 39 Stat. 752; Pet. App. 67a, "section 13 of this Act," 39 Stat. 754; Pet. App. 73a, and "section 14 of this Act," 39 Stat. 754; Pet. App. 73a. Apart from the fact that the substance of these references coincides with the subject matter of the Federal Reserve Act, the fact that the 1916 Act was not divided into numbered sections makes it plain that the phrase "this Act" can refer only to the Federal Reserve Act.

but the 1916 Act did not change that 1913 amendment. *See* Pet. App. 70a, 79a-80a.[16]

This straightforward construction of the statute, as described above, reveals the court of appeals' error in placing undue weight on the placement of punctuation. This Court has instructed lower courts, when construing statutes, to "disregard the punctuation, or . . . repunctuate, if that be necessary, in order to arrive at the natural meaning of the words employed." *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82-83 (1932); *see Crawford v. Burke*, 195 U.S. 176, 192 (1904) ("So little is punctuation a part of statutes that courts will read them with such stops as will give effect to the whole."); *Ewing's Lessee v. Burnet*, 36 U.S. (11 Pet.) 41, 54 (1837) ("[p]unctuation is a most fallible standard by which to interpret a writing"); *cf. Taylor v. United States*, 495 U.S. 575, 581-99 (1990) (Congress intended to retain the statutory definition of "burglary" despite repealing the pertinent definitional provision). The placement of the punctuation in the final printed version of the 1916 enactment—setting off each paragraph after paragraph 6 as part of Section 5202, *see* Pet. App. 70a-73a—should not control over the evidence in the text of the 1916 Act that Congress placed Section 92 in the Federal Reserve Act, not Section 5202 of the Revised Statutes.

[16] The title of the 1916 enactment, "An Act To amend certain sections of the Act entitled 'Federal reserve act,' approved December twenty-third, nineteen hundred and thirteen," 39 Stat. 752; Pet. App. 67a, confirms this point. As shown above, Congress was not amending Section 5202 in 1916, and the title of the 1916 enactment describes precisely what Congress sought to accomplish. *See INS v. National Ctr. for Immigrants' Rights, Inc.*, 112 S. Ct. 551, 556 (1991) (a statute's title "can aid in resolving an ambiguity in the legislation's text" (citations omitted)).

2. *The legislative record confirms that Congress enacted Section 92 as part of the Federal Reserve Act*

The available legislative record confirms what is apparent from the face of the 1916 enactment—that Congress placed Section 92 in Section 13 of the Federal Reserve Act, not in Section 5202 of the Revised Statutes. That record also shows that Congress did not intend for the quotation marks to have any significance in interpreting the statute.

The committee bill that became the 1916 enactment, H.R. 13391, as initially considered by the Senate, did not contain the paragraph that would become Section 92. That bill happened to use quotation marks, but inconsistently. *See* S. Rep. No. 481, 64th Cong., 1st Sess. 1-3 (1916) (Pet. Ldg. 1-2).[17] Quotation marks appeared after the provision stating that Section 13 of the Federal Reserve Act was "amended to read as follows," and closing quotation marks did not appear until after the paragraph regarding the regulation of discounting of bills of exchange and acceptances authorized by the Federal Reserve Act.[18] *See* S. Rep. No. 481, *supra*, at 1-2 (Pet. Ldg. 1-2); *see also* 53 Cong. Rec. 10,998 (1916) (Pet. Ldg. 9). The final paragraph, concerning foreign acceptances (which was printed in italics in the committee bill because it was to be added to existing law), had no quotation marks at all. *See* S. Rep. No. 481, *supra*, at 3 (Pet. Ldg. 2).

On July 17, 1916, Senator Owen, the Chairman of the Committee on Banking and Currency, introduced the amendment proposing Section 92. *See* 53 Cong. Rec. 11,153 (1916) (Pet. Ldg. 10). During the debates, after

[17] "Pet. Ldg." refers to the various contemporaneous legislative materials cited in this section of petitioner's brief that have been lodged with the Clerk of the Court.

[18] This paragraph ultimately preceded Section 92 in the bill as enacted.

Section 92 had been introduced and added,[19] Senator Brandegee commented on the committee's use of quotation marks, and asked Senator Owen whether he thought that "the amended sections ought to be left in quotation marks, so that they will appear that way in the Federal reserve act?" 53 Cong. Rec. 11,155 (Pet. Ldg. 30). Senator Owen agreed that although the committee report had used quotation marks, he did "not think they should be used." *Ibid.* Instead, he thought that the quotation marks "should be omitted." *Ibid.* Senator Brandegee then suggested "that in the reprint to be made of the bill the quotation marks be omitted." *Ibid.* Senator Owen responded that he "accept[ed] that amendment." *Ibid.* The Senate adopted the amendment without objection. *Ibid.*[20]

As a result, the reprint of the amended bill, as passed by the Senate in late July 1916, contained no potentially confusing quotation marks in the section amending Section 13 of the Federal Reserve Act, which included Section 92. *See* H.R. 13391, 64th Cong., 1st Sess. § 13 (1916) (Pet. Ldg. 31-48). It was thus clear that the reference to Section 5202 of the Revised Statutes concluded with the paragraph identified as "Fifth," thus placing Section 92 squarely within the Federal Reserve Act.

The bill then proceeded to the Conference Committee. The committee's final working version of the section amending Section 13 of the Federal Reserve Act was printed without quotation marks in Section 13. *See* H.R. Conf. Rep. No. 1175, 64th Cong., 1st Sess. (1916)

[19] The Senate's printed working version of the bill contains the quotation marks as they appeared in the committee bill. *See* H.R. 13391, 64th Cong., 1st Sess. (1916) (Pet. Ldg. 11-29). The printed amendment inserting Section 92 does not contain quotation marks. *See* Pet. Ldg. 18.

[20] Review of the Senate's printed working version of the bill shows that, as a result of the colloquy and amendment described above, the printed quotation marks were then crossed out by hand. *See* Pet. Ldg. 11-29. One quotation mark was inadvertently missed. *See* Pet. Ldg. 18.

(Pet. Ldg. 49-51). The Committee's final marked-up version, however, was changed. This version, to which the House agreed in late August 1916, contained handwritten quotation marks only at the beginning of each paragraph; the version to which the Senate agreed, however, did not contain quotation marks.[21] The House marked-up version, which was apparently slated to be printed as the final bill, and the Senate version, again each ensured that Section 92 would be placed within the Federal Reserve Act, not within Section 5202 of the Revised Statutes.

It was only in the versions reprinted in House and Senate records—after the Conference Committee's final marked-up version had been approved—that the inadvertent quotation marks appeared, thus sowing the confusion that led the court of appeals astray.[22] This clerical insertion, or error, in view of the context outlined above, may not change the substance of Congress's intended enactment. Indeed, the drafting history of this legislation confirms the wisdom of one court's recognition that "[t]he presence or absence of a comma, according to the whim of the printer or proof reader, is so nearly

[21] *See* H.R. Conf. Rep. No. 1175, 64th Cong., 1st Sess. (1916) (Pet. Ldg. 49-53); H.R. Res., 64th Cong., 1st Sess. (1916) (agreeing to H.R. Conf. Rep. No. 1175) (Pet. Ldg. 56); S. Res., 64th Cong., 1st Sess. (1916) (agreeing to H.R. Conf. Rep. No. 1175) (Pet. Ldg. 57).

The Senate's marked-up version of the Conference Committee report, H.R. Conf. Rep. No. 1175, 64th Cong., 1st Sess. (1916) (Senate mark-up) (Pet. Ldg. 58-62), and the Senate's printed final version of that report, *see* S. Doc. No. 533, 64th Cong., 1st Sess. (1916) (Pet. Ldg. 65-70), each contained no potentially confusing quotation marks in the section amending Section 13 of the Federal Reserve Act. The House of Representative's printed final version of the Conference Committee report also contained no such punctuation. *See* H.R. Conf. Rep. No. 1175, 64th Cong., 1st Sess. (1916) (House final printed version) (Pet. Ldg. 72-75).

[22] *See Journal of the House of Representatives* 994-95 (1916) (Pet. Ldg. 77-78); 53 Cong. Rec. 13,258-59, 13,354-55 (1916) (Pet. Ldg. 79-80, 81-82).

fortuitous that it is a wholly unsafe aid to statutory construction." *Erie R. Co. v. United States*, 240 F. 28, 32 (6th Cir. 1917).[23]

3. *The subject matter of the banking statutes at issue demonstrates that Section 92 initially belonged in the Federal Reserve Act*

The subject matter of the banking statutes at issue—Section 5202 of the Revised Statutes, Section 13 of the Federal Reserve Act of 1913, and the 1916 amendments to the Federal Reserve Act—further demonstrates that Section 92 initially belonged in the Federal Reserve Act.

Congress originally enacted Section 5202 of the Revised Statutes during the Civil War as part of the National Currency Act of 1863. *See* Act of Feb. 25, 1863, ch. 58, § 42, 12 Stat. 677, *repealed by* Act of June 3, 1864, ch. 106, § 36, 13 Stat. 110.[24] That provision of the

[23] Accordingly, the pertinent statutory language and legislative record effectively rebut whatever presumption may arise from the omission of Section 92 from the more recent versions of the United States Code. *See* 1 U.S.C. §§ 112, 204(a); *United States v. Bergh*, 352 U.S. 40, 47 (1956).

[24] Section 42 of the National Currency Act provided in pertinent part:

> That no association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in, and remaining undiminished by losses or otherwise, except on the following accounts, that is to say:
>
> First. On account of its notes of circulation.
>
> Second. On account of moneys deposited with, or collected by, such association.
>
> Third. On account of bills of exchange or drafts drawn against money actually on deposit to the credit of such association, or due thereto.
>
> Fourth. On account of liabilities to its stockholders, for money paid in on capital stock, and dividends thereon, and reserved profits.

12 Stat. 677.

[Continued]

Act had a limited purpose; it generally prohibited excess indebtedness of national banks, *i.e.*, those commercial banks federally chartered under the Act. In 1878, the Revised Statutes of the United States were first published. The Revisers placed Section 36 of the Act in Section 5202 of the Revised Statutes with stylistic, but no substantive, changes. *See* Pet. App. 77a.[25]

In 1913, Congress augmented the nation's banking system by enacting the Federal Reserve Act. *See* Federal Reserve Act, ch. 6, Pub. L. No. 63-43, 38 Stat. 251 (1913) . The Act established centralized federal banking authority and provided for the Federal Reserve Board to oversee the twelve Federal Reserve banks and the other member banks of the Federal Reserve system. The Act also required every national bank to become a member of the Federal Reserve system and to purchase stock and maintain reserves in that system. *See* 38 Stat. 251-53. In particular, Section 13 of the Act set forth the several powers of Federal Reserve banks, such as the authority to accept, discount, and rediscount various forms of notes

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[24] [Continued]

Section 36 of the 1864 Act provided in pertinent part:

> That no association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on the following accounts, that is to say: —
>
> First. On account of its notes of circulation.
>
> Second. On account of moneys deposited with, or collected by, such association.
>
> Third. On account of bills of exchange or drafts drawn against money actually on deposit to the credit of such association, or due thereto.
>
> Fourth. On account of liabilities to its stockholders for dividends and reserved profits.

13 Stat. 110.

[25] The National Currency Act was later recodified as part of the National Bank Act, 12 U.S.C. §§ 21 *et seq.*

and commercial paper, including those issued by national banks. *See* 38 Stat. 263-64; Pet. App. 77a-79a.

The establishment of national bank membership in the Federal Reserve system called for Congress to amend certain provisions of the National Currency Act. As relevant here, Congress amended the limitations of national bank indebtedness set forth in Section 5202 of the Revised Statutes. In Section 13 of the Federal Reserve Act, Congress therefore added a fifth provision to the exceptions set forth in Section 5202, *i.e.*, "liabilities incurred under the provisions of the Federal Reserve Act," 38 Stat. 264; Pet. App. 80a.

In 1916, Congress amended certain provisions of the Federal Reserve Act, including Section 13, which had set forth the powers of Federal Reserve banks. Among other things, Congress expanded those Section 13 powers by authorizing Federal Reserve banks to make short term advances and acquire foreign acceptances. *See* 39 Stat. 753, 754; Pet. App. 69a-70a, 71a-72a. In order to amend those Section 13 authorizations in 1916, Congress restated that provision in its entirety. In so doing, the 1916 Act therefore restated verbatim a portion of the 1913 Act that referred to amending Section 5202 of the Revised Statutes. The 1916 Act, however, did not at all change substantively the 1913 amendment to that provision regarding national bank authority. *See* Pet. App. 70a, 79a-80a.

That point is confirmed by Congress's amendment in 1916 to the Federal Reserve bank rediscount authority established by Section 13 of the Federal Reserve Act. That provision appears in the 1913 Act after the reference to Section 5202. By its terms, that particular provision belongs in the Federal Reserve Act. *See* 38 Stat. 264; Pet. App. 80a. In 1916, Congress amended that Federal Reserve Act authorization to include authorizations for discount and purchase, including those for "foreign bills of exchange, and of acceptances authorized by this Act." 39 Stat. 753; Pet. App. 70a. In other words, in 1916 Con-

gress was amending the Federal Reserve Act, not Section 5202.

As part of the 1916 amendments to Section 13 of the Federal Reserve Act, Congress also enacted Section 92. Congress's placement of that provision in the Federal Reserve Act, as opposed to Section 5202 of the Revised Statutes, is understandable. Section 5202 is a discrete provision of the original National Currency Act that dealt exclusively with limits on indebtedness of national banks. Congress would have no reason to tack onto this provision the entirely distinct subject matter of Section 92—insurance agency and real estate brokerage powers of national banks.

Moreover, Section 92 arose out of the Comptroller's written proposal to Congress in July 1916, when Congress was considering legislation to amend the Federal Reserve Act. See 53 Cong. Rec. 11,001 (1916). Congress thus reasonably used that existing legislative vehicle to accomplish the goal of augmenting national banks' authority—a point confirmed by the floor colloquy between Senator Owen and Senator Brandegee. *See* 53 Cong. Rec. 11,155 (Pet. Ldg. 30); pp. 16-17, *supra*. Indeed, other provisions of the Federal Reserve Act amended in 1916 fulfilled the same purpose. *See, e.g.*, 39 Stat. 754-56; Pet. App. 74a-76a.[26]

B. Congress Did Not Repeal Section 92 By The 1918 War Finance Corporation Act

1. *The 1918 Act did not affect the status of the Federal Reserve Act*

In 1918, Congress enacted the War Finance Corporation Act, ch. 45, Pub. L. No. 65-121, 40 Stat. 506 (1918), to aid the effort to finance World War I. By its terms,

[26] The provisions of the original National Currency Act happened to appear in scattered sections of the Revised Statutes. As Congress was creating entirely new authority for national banks by enacting Section 92, it would have decided that amendment of an existing section of the Revised Statutes was impracticable.

the 1918 Act did not affect the status of the Federal Reserve Act, which contained Section 92. Instead, the 1918 Act amended only one aspect of national bank authority contained in Section 5202 of the Revised Statutes.

As part of the 1918 legislation, Congress amended the limitations of national bank indebtedness set forth in Section 5202 of the Revised Statutes. In Section 20 of the 1918 Act, Congress therefore added a sixth provision to the exceptions set forth in Section 5202, *i.e.*, "Liabilities incurred under the provisions of the War Finance Corporation Act." 40 Stat. 512; Pet. App. 81a. Congress did not mention the language of Section 92 when it amended Section 5202. That circumstance, however, could not conceivably effect a repeal of Section 92. As shown above, Congress had not placed Section 92 within Section 5202 in the first instance.[27]

2. *There is no indication that Congress intended to repeal Section 92 in 1918*

The legislative record surrounding the 1918 Act confirms what is apparent from the statutory text, namely, that Congress had no intention of repealing the national bank insurance authority recently enacted by Section 92. Rather, Congress simply conferred on national banks an additional unrelated authority to make advances to corporations without treating the loans as in indebtedness. The purpose of the War Finance Corporation Act was limited:

> The bill is purely a war measure designed to conserve the supply of labor and materials for the purposes of the war, and to help supply the war's finan-

[27] The 1918 Act contained a blanket provision declaring that "all provisions of any Act or Acts inconsistent with the provisions of this Act are hereby repealed." 40 Stat. 515. The national bank insurance authority contained in Section 92 was scarcely "inconsistent" with the financing efforts engendered by the War Finance Corporation Act. *See United States v. Claflin*, 97 U.S. 546, 548-49 (1878).

> cial requirements, and to give them a first claim on capital seeking investment in like manner as the war's material requirements have been given a first claim on production.

S. Rep. No. 286, 65th Cong., 2d Sess. 4 (1918) (statement of W.B. McAdoo, Secretary of the Treasury). That specific purpose bore no relation whatsoever to national bank insurance authority.

The purpose of the amendment to Section 5202 of the Revised Statute set forth in Section 20 of the 1918 Act was similarly tied to that overarching concern of financing the war effort. Section 20, a House floor amendment, sought to further that effort by permitting national banks to make advances to corporations without treating the loans as an indebtedness. As Representative Kitchin explained:

> If we do not put in this provision, and make the change in the law which this amendment makes, it will tie the hands of the national banks from helping these corporations.
>
> * * * * *
>
> I think there were some of the committees that had this amendment under consideration and thought that this section of the Revised Statutes should not apply to this limitation.

56 Cong. Rec. 3804 (1918). The House Conference Report confirms that explanation:

> This section provides that section 5202 of the Revised Statutes of the United States relating to the indebtedness of a national banking association shall not apply in the case of any liability incurred by such association under the provisions of the War Finance Corporation act. This provision does not appear in the Senate bill. The conferees adopt the House section.

H.R. Conf. Rep. No. 448, 65th Cong., 2d Sess. 19 (1918); *see* 56 Cong. Rec. 4457 (1918).

Indeed, the Comptroller's contemporaneous report to Congress further demonstrates the limited purpose of Section 20 of the 1918 Act. In the report, the Comptroller described that provision as "amend[ing] section 5202 [of the Revised Statutes], so as to exempt from the liabilities which may be incurred by national banks those incurred under the provisions of the war finance act." *Annual Report of the Comptroller of the Currency* 79, 171 (1918).

The evident purpose of Section 20 of the 1918 Act therefore had no relation to the national bank insurance authority conferred by Section 92. It is thus understandable that Congress made no mention of Section 92 during its consideration of the 1918 Act.[28] In the face of that legislative record, there is no plausible basis for assuming that Congress, by enacting the War Finance Corporation Act in 1918, had any intention of repealing the national bank insurance authority it had adopted two years before. *Accord American Land Title Ass'n v. Clarke*, 968 F.2d 150, 151-54 (2d Cir. 1992), *petitions for cert. pending* (Nos. 92-482 & 92-645).

3. *Section 92 should not be subject to an implied repeal*

This Court has adhered to "[t]he cardinal rule . . . that repeals by implication are not favored." *Posados v. National City Bank*, 296 U.S. 497, 503 (1936); *see Morton v. Mancari*, 417 U.S. 535, 549 (1974); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). In order to effect a repeal, "[t]he intention of the legislature to repeal must be clear and manifest." *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (internal quotation marks and citations omitted); *see Red Rock v. Henry*, 106 U.S. 596, 602 (1883).

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[28] *See* H.R. Conf. Rep. No. 448, 65th Cong., 2d Sess. (1918); 56 Cong. Rec. 2777-805, 2847-61, 2913-27, 3039-53, 3081-109, 3130-51, 3293-96, 3605-32, 3659-87, 3779-812, 3843-45, 4373-79, 4452-63 (1918).

Here, there is no evidence that Congress intended to repeal Section 92 in 1918. To the contrary, all the available evidence—the text and legislative record of the 1918 War Finance Corporation Act—show conclusively that Congress did not seek to repeal the national bank insurance authority recently enacted by Section 92. Instead, Congress was tackling a wholly unrelated issue, namely, financing the war effort and enabling national banks to contribute to that effort.

C. The Uniform Consideration By The Comptroller, The Federal Reserve Board, The Congress, And The Federal Courts Regarding The Validity Of Section 92 Is Entitled To Considerable Weight

This Court has recognized that the "uniform construction" of a statute by the appropriate authorities is entitled to considerable weight when confronted with an issue of statutory interpretation. *Wisconsin v. Illinois*, 278 U.S. 367, 413 (1928); *see, e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1934). Here, the Comptroller, the Federal Reserve Board, the Congress, and the federal courts, including this Court, have uniformly considered Section 92 to be in effect. Although such consideration cannot revive a repealed statute, the texts and legislative record of the relevant statutes in this case do not support the conclusion that Section 92 was repealed. At the least, there is ambiguity.[29] In such circumstances, that informed and unanimous position should have been enforced, not jettisoned as the court of appeals chose to do.

The canon of statutory construction discussed above applies with particular force, where, as here, the pertinent regulatory authorities have contemporaneously construed the statute. This Court has long concluded:

[29] As the court of appeals itself acknowledged, the statutory analysis confirming Section 92's validity is "plausible." Pet. App. 17a.

> In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.

Edward's Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827); *accord Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315 (1933) (interpretation entitled to "peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting the machinery in motion"); *see Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97 (1983); *United States v. Shreveport Grain & Elevator Co.*, 284 U.S. at 84.

Since its enactment in 1916, the Comptroller and the Federal Reserve Board, the two regulators with principal authority over the banking statutes at issue, have considered Section 92 to be part of the Federal Reserve Act and to remain in effect. Both the Comptroller and the Federal Reserve Board, in compilations of pertinent banking statutes submitted to Congress in 1917, each set forth Section 92 as part of the Federal Reserve Act.[30] The year before, the Comptroller in its Annual Report had also expressed the same view. *See Annual Report of the Comptroller of the Currency* 925 (1916).[31] More-

[30] *See* S. Doc. No. 412, 64th Cong., 1st Sess. 83-84, 136-37 (1917) (Comptroller's compilation entitled "The National Bank Act as Amended, the Federal Reserve Act, and Other Laws Relating to National Banks") (Perhaps as a matter of caution, the Comptroller also set forth Section 92 as part of the Revised Statutes.); *Third Annual Report of the Federal Reserve Board* 135-36 (1917); *see also* Federal Reserve Board, *The Federal Reserve Act As Amended* 30 (1917) (placing Section 92 and companion paragraphs in Section 13 of the Federal Reserve Act, although reproducing the confusing punctuation of the Statutes at Large).

[31] Accordingly, the court below erred in assuming that "there were only three sources to which [the 65th Congress] could turn for up-to-date information: the Statutes at Large, . . . or either of two privately published services." Pet. App. 11a.

over, in a post-1918 compilation, the Federal Reserve Board continued to show Section 92 as part of Section 13 of the Federal Reserve Act. *See* Federal Reserve Board, *The Federal Reserve Act As Amended* 30 (1919).

The uniform position adopted by the Comptroller, the Federal Reserve Board, the Congress, and the federal courts regarding the continuing validity of Section 92 should also be followed. Since Section 92's enactment in 1916, the Comptroller has issued regulations on bank insurance activities. *See* 22 Fed. Reg. 10,075 (1957) (amending 1916 regulation); *see also* 12 C.F.R. § 7.7100; note 2, *supra*. Until 1932, the Comptroller reported statistics on bank insurance activities authorized under Section 92 to Congress.[32] Most importantly, when asked to comment on the subject, the Comptroller has made it clear to Congress that the office had consistently taken the position that Section 92 was not part of Section 5202 of the Revised Statutes and was not repealed inadvertently in 1918.[33]

Congress has similarly considered Section 92 to remain in effect since the date of its enactment. In a post-1918 statutory compilation, for example, the Senate Committee on Banking and Currency, the committee that oversaw implementation of the banking laws, continued to show Section 92 in effect as part of Section 13 of the Federal Reserve Act. *See* S. Doc. No. 216, 66th Cong., 2d Sess. 146 (1920).

During the late 1950s, Congress considered whether Section 92 had been inadvertently repealed. In response

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[32] *See Financial Institutions Act of 1957: Hearings on S. 1451 and H.R. 7206 before the House Comm. on Banking and Currency*, 85th Cong., 2d Sess., pt. 2, at 1068 (1958) ("*House Hearings*").

[33] *See House Hearings* 1036 (letter from Comptroller Gidney to House Banking Chairman Spence). The Comptroller's letter was accompanied by a supporting memorandum prepared by the Federal Reserve Board. *See id.* at 1036-40.

to Representative Patman's assertion that the statute was repealed,[34] Congress received contrary submissions from the Comptroller and other authorities, including the general counsel to the Housing Banking Committee, the counsel to the Advisory Committee for the Study of Federal Statutes Governing Financial Institutions and Credits, and the Library of Congress's Legislative Reference Service. Each of these submissions made it clear that Section 92 remained in effect.[35]

In view of these submissions, it is not surprising that Congress has affirmatively treated Section 92 to be in effect. In 1982, for example, Congress amended an aspect of Section 92 unrelated to the insurance provision. *See* Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 403(b), 96 Stat. 1510-11. In 1987, Congress imposed a one-year moratorium on the expansion of insurance activities "pursuant to the Act of September 7, 1916 (12 U.S.C. 92)." Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 201(b)(5), 101 Stat. 583.[36] And in 1991, Congress considered—but did not enact—legislation that would have substantially

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[34] *See House Hearings* 989-90, 1060-63.

[35] *See House Hearings* 1065-71, 1010-25, 1063-65; note 33, *supra*. The House Banking Committee ultimately issued no formal opinion regarding the validity of Section 92. *See House Hearings* 1090, 1199. Several years later, the staff of a subcommittee of the House Banking Committee concluded that Section 92 had been repealed. *See Consolidation of Banking Examining and Supervisory Functions, 1965: Hearings on H.R. 107 and H.R. 6885 before the Subcomm. on Bank Supervision and Insurance of the House Comm. on Banking and Currency*, 89th Cong., 1st Sess. 3, 391 (1965).

[36] In imposing that moratorium, Congress did not at all question the validity of Section 92. *See, e.g.*, S. Rep. No. 19, 100th Cong., 1st Sess. 17 (1987) ("Existing law authorizes a national bank 'located and doing business in any place the population of which does not exceed five thousand inhabitants' to act as an insurance agent. The scope of that authority is currently in dispute.").

amended Section 92 and curtailed national banks' insurance activities.[37]

Federal courts, including this Court in *Commissioner v. First Sec. Bank of Utah, N.A.*, 405 U.S. 394, 401 & n.12 (1972), following the lead of the regulatory authorities and the Congress, have similarly considered Section 92 to have remained in force.[38] Indeed, in reviewing a challenge to the Comptroller's administration of the insurance authority granted by Section 92, this Court recognized that the Comptroller's "administrative interpretation over many years is entitled to great weight." *Commissioner v. First Sec. Bank of Utah, N.A.*, 405 U.S. at 403 n.16. Moreover, in light of this unbroken line of authority, the Fifth Circuit has remarked that "further discussion of the issue [of Section 92's existence] seems moot." *First Nat'l Bank of Lamarque v. Smith*, 610 F.2d 1258, 1261 n.6 (5th Cir. 1980).

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[37] *See* H.R. Rep. No. 157, 102d Cong., 1st Sess., pt. 1, at 81-82, 192 (1991) (describing proposed § 432 of H.R. 6, 102d Cong., 1st Sess. (1991)); H.R. Rep. No. 157, 102d Cong., 1st Sess., pt. 4, at 56-57, 154 (1991) (describing proposed § 432 of H.R. 6, 102d Cong., 1st Sess. (1991)); S. Rep. No. 167, 102d Cong., 1st Sess. 170-71, 480 (1991) (describing proposed § 771 of S. 543, 102d Cong., 1st Sess. (1991)).

[38] *See, e.g., American Land Title Ass'n v. Clarke*, 968 F.2d 150, 151-54 (2d Cir. 1992), *petitions for cert. pending* (Nos. 92-482 & 92-645); *Independent Ins. Agents of America, Inc. v. Board of Governors of the Fed. Reserve System*, 736 F.2d 468, 477 (8th Cir. 1984); *Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1170 & nn.18-20 (D.C. Cir. 1979); *First Nat'l Bank of Lamarque v. Smith*, 610 F.2d 1258, 1261-62 & n.6 (5th Cir. 1980); *Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010, 1013 (5th Cir. 1968); *Commissioner v. W. Morris Trust*, 367 F.2d 794, 795 n.3 (4th Cir. 1966); *Genessee Trustee Corp. v. Smith*, 102 F.2d 125, 127 (6th Cir. 1939); *Owensboro Nat'l Bank v. Moore*, 803 F. Supp. 24, 33 (E.D. Ky. 1992), *appeals pending*, Nos. 92-6330 & 92-6331 (6th Cir.); *Thompson v. Kerr*, 555 F. Supp. 1090, 1096 (S.D. Ohio 1982); *Guaranty Mortgage Co. v. Z.I.D. Assocs., Inc.*, 506 F. Supp. 101, 104 (S.D.N.Y. 1980).

This longstanding—and uniform—administrative, congressional, and judicial position regarding the validity of Section 92 should not be cast aside. As this Court has recognized in analogous circumstances:

> When a court reaches the same reading of the statute as the practical construction given it by the enforcing agencies over a 60-year period, that is a powerful weight supporting such reading. Here, moreover, the business community directly affected and the enforcement agencies and the Congress have read this statute the same way for 60 years. . . . While these views are not binding on this Court, the weight of informed opinion over the years strongly supports [acceptance of that construction of the statute].

Bankamerica Corp. v. United States, 462 U.S. 122, 132 (1983) (construing Clayton Act). Those principles likewise call for this Court to conclude that, in view of the authorities cited above, Section 92 remains in existence.

II. THE COURT OF APPEALS ERRED IN DETERMINING WHETHER SECTION 92 REMAINS IN FORCE

A. The Court Of Appeals Should Not Have Determined Whether Section 92 Remains In Force Because That Issue Did Not Involve Plain Error Or The Court's Jurisdiction

Under well-established federal appellate procedure, courts are obliged to treat unasserted claims as waived and not properly before them. *See, e.g., McCormick v. United States*, 111 S. Ct. 1807, 1814 n.6 (1991); *Kamen v. Kemper Fin. Servs.*, 111 S. Ct. 1711, 1718 n.5 (1991); *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). That procedure is fundamental to our method of adjudicating controversies:

> The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases,

distinguishes our adversary system of justice from the inquisitorial one.

United States v. Burke, 112 S. Ct. 1867, 1877 (1992) (Scalia, J., concurring in the judgment). In other words, such a requirement ensures "[a] fair adversary process [that] presupposes both a vigorous prosecution and a vigorous defense" of the issues in dispute. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1978); *see Baker v. Carr*, 369 U.S. 186, 204 (1962).

That fundamental procedural principle, as with other legal rules, is subject to certain exceptions. First, an appellate court may consider an unasserted claim if it involves the court's jurisdiction. *See, e.g., Collins v. Youngblood*, 497 U.S. 37, 41 (1990); *Gutierez v. Waterman S.S. Co.*, 373 U.S. 206, 209 (1963). Second, an appellate court may consider such a claim if it involves plain error "where injustice might otherwise result." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941); *see, e.g., Singleton v. Wulff*, 428 U.S. at 121; *Turner v. City of Memphis*, 369 U.S. 350, 353 (1962) (*per curiam*); *see also United States v. Atkinson*, 297 U.S. 157, 160 (1936).

Here, it is plain that the court of appeals glossed over these principles and erroneously reached out to consider whether Congress had inadvertently repealed Section 92. Despite the court's repeated invitation, no party raised the issue and no party contended that Congress had repealed Section 92 in 1918. *See* note 8, *supra*. That issue, by its terms, does not involve the jurdisdiction of either the district court or the court of appeals.[39] As such, the issue was not properly before the court.

Similarly, the Section 92 issue does not involve the sort of "plain error" warranting departure from the general

[39] The district court exercised jurisdiction over respondents' administrative challenge to the Comptroller's decision under 28 U.S.C. §§ 1331, 1337, and 1361. The court of appeals exercised jurisdiction over the appeal under 28 U.S.C. § 1291.

prohibition against addressing unasserted claims. The court of appeals' resolution of the Section 92 issue can certainly not be said to be beyond any doubt. *Compare Turner v. City of Memphis*, 369 U.S. at 353 ("On the merits, no issue remains to be resolved. This is clear under prior decisions and the undisputed facts of the case."). The court of appeals itself acknowledged that the statutory analysis confirming Section 92's validity is "plausible." Pet. App. 17a.[40] Indeed, the continuing validity of Section 92 had understandably remained unchallenged in—and had even been ratified by—the reported case law.[41]

Nor is this a case where "injustice might otherwise result" if the Section 92 issue had not been determined. *Hormel v. Helvering*, 312 U.S. at 557. To the contrary, the court of appeals' reaching out to resolve the issue threatened the settled state of affairs that had given rise to widespread and substantial national and state bank insurance activities across the country.[42] Thus,

[40] During oral argument before the court of appeals, respondents' counsel stated that "we cannot advance a substantial argument that section 92 no longer exists." Pet. App. 24a.

[41] For that reason, this is not a case where the court was confronted with the "need [to] render judgment on the basis of a rule of law whose nonexistence is apparent on the face of things, simply because the parties agree upon it." *United States v. Burke*, 112 S. Ct. 1867, 1877 (1992) (Scalia, J., concurring in the judgment).

[42] The Office of the Comptroller of the Currency has estimated that at least 179 national banks are engaged in insurance operations under the aegis of Section 92. In addition, the Comptroller has estimated that at least 115 state-chartered banks sell insurance under state parity laws that permit such banks to engage in the same activities as national banks. *See* Declaration of Rosa M. Koppel, Esq., Office of the Comptroller of the Currency ¶¶ 6, 7 (Apr. 14, 1992), *Owensboro Nat'l Bank v. Moore, supra; see, e.g.*, Ariz. Rev. Stat. Ann. § 6-184.2 (1956); Ill. Rev. Stat. ch. 17, para. 311(11) (1992); Md. Fin. Inst. Code Ann. § 5-504 (1992); N.D.

> [i]njustice is more likely to result from [the court's] reaching the issue [of the validity of Section 92] than from [the court's] declining to do so, because [that] question . . . affects many entities, including members of the insurance and banking industries who have relied on the law's continued existence . . . .

Pet. App. 29a (Silberman, J., dissenting).

B. The Court Of Appeals Should Not Have Determined Whether Section 92 Remains In Force, Where The Parties Neither Presented Nor Took Adverse Positions On That Issue

The court of appeals' consideration of the Section 92 issue conflicts with another established legal doctrine. This Court has made clear that Congress has not conferred—and may not confer—"jurisdiction on Art. III federal courts to render advisory opinions, . . . because suits of this character are inconsistent with the judicial function under Art. III." *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972) (citations omitted); *see, e.g., Muskrat v. United States*, 219 U.S. 346 (1911). As this Court has instructed, a prohibited advisory opinion is "an abstract determination by the Court of the validity of a statute . . . or a decision advising what the law would be on a hypothetical state of facts." *Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace*, 288 U.S. 249, 262 (1933) (citations omitted).

Here, the court of appeals reached out to nullify Section 92 by creating a controversy of its own making. As this Court has cautioned, federal courts should not strive to resolve issues that the parties have not properly presented where, as here, the issue concerns the validity of an Act of Congress. *See Williams v. Zbaraz*, 448 U.S.

Cent. Code § 6-03-38 (1987); Utah Code Ann. § 7-3-10(1) (1953); *see also* U.S. Pet., No. 92-507, at 19 n.11 ("Whatever the exact figure, it is clear that a significant number of national banks currently engage in activities authorized by Section 92.").

358, 367 (1980) (district court exceeded jurisdiction by invalidating federal statute where parties had not challenged it). Indeed, that prohibition applies with particular force in this case, because federal courts "do not sit . . . to give advisory opinions about issues as to which there are not adverse parties before [the courts]." *Princeton Univ. v. Schmid*, 445 U.S. 100, 102 (1982) (*per curiam*).[43] The critical point remains that, until ordered to respond to petitions for rehearing filed by the Comptroller and petitioner, respondents expressly adhered to the position that Section 92 remained good law. *See* notes 8, 10, *supra*.[44] As the validity of Section 92 was affirmatively uncontested, that issue should have remained undecided.

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[43] *See Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.").

[44] Respondents err (Br. in Opp. 23 n.30) in asserting that the court of appeals' decision may be excused under the principle that courts need not accept "stipulations as to questions of law." *Estate of Sanford v. Commissioner*, 308 U.S. 39, 51 (1939); *see* Pet. App. 33a (Sentelle, J., concurring in the denial of rehearing *en banc*). The parties did not reach any stipulation. To the contrary, the record shows that the parties reached the same conclusion that Section 92 remained valid.

Moreover, contrary to respondents' suggestion (Br. in Opp. 23 n.31), the fact that the parties here each took the position that Section 92 remained good law is not tantamount to putting that question of law "in controversy."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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